

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>ADELITA C. DIAZ</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>NORLAND PLASTICS COMPANY</b>	)	
Respondent	)	Docket Nos. 1,030,289
	)	and 1,030,290
AND	)	
	)	
<b>TRAVELERS INDEMNITY COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

**STATEMENT OF THE CASE**

Respondent and its insurance carrier (respondent) and claimant requested review of the December 17, 2008, Award in Docket No. 1,030,289. Claimant requested review of the December 22, 2008, Award in Docket No. 1,030,290. Both Awards were entered by Special Administrative Law Judge Jerry Shelor. The Board heard oral argument on April 17, 2009. Joseph Seiwert, of Wichita, Kansas, appeared for claimant. Terry J. Torline, of Wichita, Kansas appeared for respondent.

In Docket No. 1,030,289, the Special Administrative Law Judge (SALJ) found that claimant suffered a compensable injury and that claimant's date of accident for purpose of calculating the award is August 9, 2006. The SALJ found that claimant provided respondent with timely notice and timely written claim, that claimant's recovery in this claim is not barred by the doctrine of equitable estoppel, and that claimant did not sustain an intervening accident. The SALJ found that claimant's preinjury average weekly wage was \$349.08. Finally, the SALJ found that claimant had a 20 percent permanent partial impairment to the body as a whole relative to her low back.

In Docket No. 1,030,290, the SALJ found that claimant met with personal injury by accident involving her neck on or about May 2004 and each and every day through her last day of employment, and that her injury arose out of and in the course of her employment with respondent. The SALJ found that claimant is not barred from an award by the doctrine of equitable estoppel and that claimant provided respondent with timely notice of her accident. However, the SALJ found that claimant did not provide respondent with timely

written claim regarding her neck injury and, accordingly, denied benefits in this docketed action. The SALJ found that the issues concerning average weekly wage and nature and extent of disability were moot.

The Board has considered the record and adopted the stipulations listed in the Award.

### **ISSUES**

In Docket No. 1,030,289, claimant requests review of the SALJ's finding that she was limited to her functional disability and argues she should be entitled to a work disability in the amount of 95.65 percent based on a 100 percent wage loss and a 91.03 percent task loss. In Docket No. 1,030,290, claimant requests the Board affirm the SALJ's findings that she was injured by accident arising out of and in the course of her employment with respondent and that she provided timely notice. She requests review of the SALJ's finding that she failed to provide timely written claim for her neck injury. In both cases, claimant requests review of the SALJ's December 22, 2008, denial of her request to reopen the record to obtain additional wage and fringe benefit information.

In both docketed claims, claimant argues that respondent should be estopped from denying claimant provided timely notice, written claim and application for hearing because after claimant notified respondent that she was injured at work, respondent encouraged her to proceed with disability claims instead of workers compensation claims.

In Docket No. 1,030,289, respondent contends that claimant did not suffer a work related injury and that her low back injury did not arise out of and in the course of her employment but, instead, resulted from lifting a child at home. If the Board finds that claimant suffered a compensable injury, respondent contends the SALJ improperly found that claimant's date of accident was August 9, 2006, and argues that the proper date of accident would be September 2000, in which case claimant failed to provide respondent with timely notice and timely written claim. Respondent also contends that claimant suffered an intervening accident involving her low back on August 24, 2006, which would preclude claimant from recovering benefits in this case.

In Docket No. 1,030,290, respondent requests that the Board affirm the SALJ's finding that claimant failed to provide it with timely written claim. In the event the Board reverses the SALJ on this issue, the respondent requests the Board find that claimant failed to prove she suffered an accidental injury to her neck that arose out of and in the course of her employment with respondent and failed to provide timely notice of her alleged accidental injury.

In both dockets, respondent argues that claimant should be estopped from receiving workers compensation benefits because she requested and received short term disability benefits for her injuries. Respondent argues that claimant failed to provide evidence related

to her average weekly wage. Respondent asserts that claimant is not permanently totally disabled. Finally, respondent argues that Doug Lindahl's task list is not accurate, so the task loss opinions of Dr. Murati should not be admissible.

The issues for the Board's review are:

(1) Did claimant sustain an injury by accident that arose out of and in the course of her employment in relation to either Docket No. 1,030,289 or 1,030,290?

(2) Are claimant's requests for workers compensation benefits barred by the doctrine of equitable estoppel in either Docket No. 1,030,289 or 1,030,290?

(3) Is respondent barred by equitable estoppel from raising the defenses of no timely notice, written claim and application for hearing?

(4) What are the dates of accident in Docket No. 1,030,289 and 1,030,290?

(5) Did claimant provide respondent with timely notice in Docket No. 1,030,289 and/or 1,030,290?

(6) Did claimant provide respondent with timely written claim in Docket No. 1,030,289 and/or 1,030,290?

(7) Did claimant file a timely Application for Hearing in Docket No. 1,030,289?

(8) In Docket No. 1,030,289, did claimant suffer an intervening injury that precludes her recovery for her low back injury?

(9) Did the ALJ err in denying claimant's request to open the records in these cases to obtain wage and fringe benefit information? What is claimant's preinjury average weekly wage?

(10) Is the task list prepared by Doug Lindahl inaccurate, and if so, should the task loss opinions of Dr. Murati be inadmissible in these cases?

(11) What is the nature and extent of claimant's disability?

**FINDINGS OF FACT**

Claimant began working for respondent in 1999. She has held a number of positions during that employment. She claims that in approximately September 2000,<sup>1</sup> while she was running automated machines (running autos), she picked up a box off the floor and began to dump the contents onto a table when she pulled a muscle in her back. She claims she reported the injury to her supervisor, Tony Widick. She said that Mr. Widick did not have her fill out an accident report, but he asked her if she wanted to go to the emergency room and she declined. She said Mr. Widick then pulled her off the job of running autos and moved her to a machine that allowed her to sit while working. She testified that she saw her personal physician, Dr. Ted Snodgrass, the day after pulling her muscle.

Mr. Widick testified that he did not recall claimant reporting a back injury in September 2000. He said that if claimant had reported an injury, he would have immediately filled out an accident report, and a copy of the report would have gone to the plant manager and to the Human Resources Department.

Claimant testified she went to see Don Leidheiser, respondent's human resources manager, after receiving a restriction from Dr. Snodgrass to work on sit-down machines only. She said she told Mr. Leidheiser how she hurt her back and he filled out an accident report, which she signed. She claims she told him she had been referred to Dr. Robert Eyster by Dr. Snodgrass and that he gave her permission to see Dr. Eyster.

Claimant said she saw Dr. Eyster several times, and he provided her with pain medication and ordered an MRI. Claimant testified, however, that Dr. Eyster told her he could not do any more for her and she asked Dr. Snodgrass for a referral to another doctor. She said that Dr. Snodgrass then referred her to Dr. Kris Lewonowski, who recommended surgery. When she realized she would be having surgery on her low back, she talked to Mr. Leidheiser again. She testified that when she told Mr. Leidheiser she was going to have surgery, he asked if the surgery was due to the same accident she had reported earlier. Her testimony is that Mr. Leidheiser told her that if she claimed workers compensation at that point, if a second surgery was required it would not be paid for by either workers compensation or her personal health insurance. She said he recommended that she have the surgery paid for under her personal health insurance and make sure everything was okay and then, if she had to go in for another surgery, it would be taken care of. She claims that Mr. Leidheiser told her that he would take care of everything. She said he was also talking to her doctor. She claims she did not know what he was setting up—just that she was going to be taken care of and did not have to worry about it.

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<sup>1</sup> In her Evidentiary Deposition taken September 29, 2006, claimant testified that she injured her low back in July 2000. But at the January 16, 2007, preliminary hearing and at the July 28, 2008, regular hearing, claimant testified her injury occurred in September 2000.

Mr. Leidheiser testified that sometime in 2000, claimant came into his office and told him that she thought she might have hurt herself at work three or four weeks earlier. He said she was not sure exactly when she was injured but thought it was when she was lifting a box. He claims he asked her if she had reported the injury to her supervisor and she said she had not. He then told her that she needed to talk to Mr. Widick and get the paperwork done. He said that all work injury claims start with the supervisor, who fills out an accident report and then gives a copy of the report to the supervisor's immediate supervisor, the plant manager, the general manager, and the Human Resources Department.

Mr. Leidheiser testified he told claimant that because she had been under treatment for back problems in the past and because the claim was so vague, if she elected to file a workers compensation claim, he would have to inform the insurance carrier that respondent would challenge the claim. He said he was emphatic when he told her that unless she could come up with some details of her injury, a workers compensation claim would be challenged. He told her if she wanted to instead apply for short-term disability, they would fill out the paperwork. He suggested she think it over and let him know what she wanted to do.

On October 3, 2000, claimant returned to his office and said she had elected to fill out the paperwork for short-term disability benefits. He pulled out a claim form and filled out the top half of the form and gave it to claimant to fill out the bottom half. He testified that claimant filled out the entire bottom half of the form, including putting an X in the box indicating that she was not receiving or eligible for workers compensation or social security disability benefits. She also put an X in the box indicating that her accident or illness was not work related. He said no one else was present in the office when the forms were completed and that he definitely did not fill in those two boxes. Claimant testified that the Xs made on the short term disability claim form dated October 3, 2000, were not made by her. She testified that she did not make her Xs like that, but that she makes a lazy X wherein she does not pick up her pen until she had completed making the X. She acknowledged, however, that it was her signature on the bottom of the form.

Debra Walling, one of claimant's former coworkers, testified that she used to give claimant rides to work. Ms. Walling testified that she did not witness the incident where claimant injured her back at work, but claimant told her about it. She said that claimant's job was switched and that only a supervisor would have authority to switch an employee's job. Ms. Walling testified she suggested that claimant see a doctor, but claimant told her she was going to see Mr. Leidheiser.

Ms. Walling also testified that she tried to talk to claimant about the difference between workers compensation and short-term disability. She told claimant she should be filing for workers compensation rather than using her personal health insurance. She was also present when claimant's ex-husband told claimant that if she got hurt at work, it was supposed to be paid under workers compensation. However, claimant told Ms. Walling that Mr. Leidheiser told her it would be better for her and for the company to have the surgery

paid for by her insurance. Ms. Walling said that despite her efforts to explain the differences between short-term disability and workers compensation to claimant, she does not think it sank in because claimant considered Mr. Leidheiser to be a friend.

The deposition of Dr. Snodgrass was taken for the purpose of introducing into the record his medical records concerning claimant. The records, which include dates of service from May 2000 to October 2002, do not reveal that claimant ever complained to him of a work-related injury. The records show that on September 8, 2000, claimant called and later went into Dr. Snodgrass' office complaining of low back pain. The telephone message indicates that claimant was in a lot of pain and was screaming and that she had been holding a baby. In a second telephone message, claimant asked for work restrictions and asked why her back keeps going out. The office visit notes indicate she said she had been holding a 25-pound baby when she twisted and had pain in her back; she thought her back was out of place and requested a referral to a chiropractor or osteopathic doctor. She said she had experienced a similar back injury two or three years earlier. Dr. Snodgrass diagnosed her with lumbar back strain with a date of accident of September 8.

Notwithstanding the medical records, claimant said the incident with the baby never happened. She denied injuring her back while holding a baby and denied making a telephone call to Dr. Snodgrass' office making that claim and asking to be seen.

Dr. Snodgrass' records indicate that on September 26, 2000, claimant called and told him she needed short term disability forms, as well as a form that states she can be off work. She called back later saying that she hurts severely when she vacuums, mops and sweeps. She indicated that her work involved bending and lifting parts off the floor and that she needed a work release stating she could not work or a restriction saying she should do no lifting. Dr. Snodgrass responded that he would not give her a release until she had seen Dr. Eyster.

Claimant had low back surgery on November 21, 2001, performed by Dr. Lewonowski. She testified that all her medical bills were paid through her health insurance. While she was off work, she received a check every two weeks. She testified that she did not know who the payments were from. She was just getting a check like Mr. Leidheiser told her she would get. She also said that she thought she was getting workers compensation benefits until her attorney told her differently. The checks actually came from Fortis and were short-term disability benefits.

After claimant's surgery, she returned to work at respondent. She had a 10-pound weight restriction. She stated she pretty much stayed within that restriction at work. Although after she returned to work, she was on and off pain medication. However, she also said her surgery was successful and she was symptom free for approximately two years, until she injured her neck.

Claimant said she suffered an injury to her neck at work in May 2004 when something popped in her neck as she was reaching to pull down a box from a shelf. She reported her injury to her supervisor, Mike Abedini. She said that Mr. Abedini filled out an accident report, and she signed it. Mr. Leidheiser was still the human resource director, and Mr. Abedini told her to talk to him. She talked to Mr. Leidheiser that same day. Claimant said that when she told Mr. Leidheiser that Mr. Abedini had filled out an accident report, Mr. Leidheiser said that they would handle it the same way they had handled her back.

Mr. Abedini testified that he remembered that claimant had reported an injury to him at some point but he did not remember when that was. He said that he filled out an accident report and put it in the human resources file in the supervisor's office.

Claimant said that Mr. Leidheiser filled out all the paperwork for her neck injury, and she signed it. She did not read the paperwork before she signed it because Mr. Leidheiser told her not to worry about it, that he would fill it out for her. She testified that she did not know what she was signing for and thought it was workers compensation. Mr. Leidheiser testified that he does not remember a lot about that claim because the company was going through a change at the time and he was very busy. However, he testified that he did not receive any paperwork on an injury. He said that at the time of the alleged 2004 injury, his assistant did a lot of the day-to-day benefit administration. Mr. Leidheiser identified a short-term disability claim form dated September 28, 2004, as being one filed on behalf of claimant. He said that the top half of the form was prepared by his assistant. He testified he did not fill in the Xs on the bottom half of the form that indicate claimant was not eligible for workers compensation and that the injury or illness was not work related.

Mr. Leidheiser testified that although Mr. Abedini was knowledgeable and dedicated to his job, there were previous situations where he did not get documentation that Mr. Abedini should have filed. He also said that it was a very chaotic time at respondent and it was possible that Mr. Abedini filled out the paperwork and lost it, so it was never processed. Mr. Abedini testified that it was his opinion that Mr. Leidheiser was resistant to employees filing workers compensation claims and would get upset if an accident was reported.

Mr. Leidheiser stated that the human resources department kept a log of work injuries for OSHA. He said there is no mention on the list of an accident alleged by claimant in either 2000 or 2004. Ellen Ulrich, the current human resources manager at respondent, testified that she searched through all the records of the human resources department and did not find any workers compensation paperwork for claimant other than an injury for dust in the right eye in 2003. There was no paperwork for a work-related back injury in 2000 or neck injury in 2004. The only forms Ms. Ulrich found were in claimant's personnel file and were the forms for short-term disability benefits. She testified that she started working for respondent in April 2005, and found the record keeping had been very meticulous.

Claimant had surgery on her neck on September 24, 2004, which was performed by Dr. John Dickerson. Again, her health insurance paid all the medical bills. She again received checks from Fortis during the period she was off work. She said her neck surgery was successful, and she was able to return to work at respondent.

Claimant testified that she again developed additional problems with her low back, which she attributed to lifting and pushing boxes at work. On September 20, 2005, she returned to Dr. Lewonowski, complaining of increasing back pain. He started her on a series of epidural injections in her back. He continued to treat claimant until March 2006, at which time he referred her to Dr. Chandra Tokala for pain management. All this treatment was paid for by her health insurance.

Claimant testified that about July or August 2006, her job changed and she was required to push carts. She said the first night she had to push the carts, she was in pain and had to leave early. Claimant said she began having severe pain in her low back and numbness in her left leg, as well as some problem with her right leg. As she continued to work, her back condition worsened. She spoke with Ms. Ulrich, and her job was switched so that she no longer had to push a cart.

On August 9, 2006, claimant filed an Application or Hearing claiming injuries to her "back and all parts affected thereby" for an series of injuries "beginning on or about 9/00 and each day worked through current employment."<sup>2</sup> This was designated as Docket No. 1,030,289. She filed a second Application for Hearing alleging injuries to her "neck and all parts affected thereby" for a series of accidents "on or about 5/04 and each day worked thereafter."<sup>3</sup> That claim is designated Docket No. 1,030,290.

On August 24, 2006, claimant was involved in an altercation with her two teenage children. She said her daughter shoved her, and she fell, landing on the coffee table. When she got up, her son came up from behind and grabbed her. When she turned around, he started shoving her. She called the police and had both children jailed. The next day, she went to see Dr. Robert Gonzales, her current personal physician, complaining of pain in her neck and mid-thoracic spine. She returned to see Dr. Gonzales on August 29, complaining of low back pain with radicular symptoms in her left leg, and he took her off work. Her last day of work was sometime in late August 2006. She returned to Dr. Lewonowski on September 12, 2006, and the second surgery on her low back was performed on September 21, 2006.

Dr. Paul Stein, a board certified neurosurgeon, examined claimant on July 26, 2007, at the request of the ALJ. Claimant told him she injured her low back in 1999 or 2000 when

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<sup>2</sup> Form K-WC E-1, Application for Hearing filed August 9, 2006.

<sup>3</sup> K-WC E-1, Application for Hearing filed August 9, 2006.



she bent over to pick up a box, twisted to place it on a table, and felt pain in her low back. Claimant gave a history of her treatment, including surgery by Dr. Lewonowski on November 21, 2001. Claimant told Dr. Stein that a few years later she was pulling down a box from above when she felt something pop in her neck and felt pain. On September 24, 2004, claimant had a two-level anterior cervical discectomy and fusion. She improved post-operatively but did not have complete resolution of symptoms. She returned to work in quality control, a lighter duty job. Claimant told Dr. Stein that when she returned to work, although she had no new specific injury or incident, her back starting hurting again. Claimant told Dr. Stein about the shoving incident with her daughter on August 24, 2006. On September 21, 2006, she again had surgery on her low back.

Claimant said she currently had pain in the low back all the time. She had a burning discomfort in the left buttock but had no radiation into her lower extremity. She said the last surgery was not helpful, but the pain was not as severe as it was. She could tolerate walking for about one block. She needed to alternate sitting and standing. She had no numbness and tingling.

Dr. Stein was unable to document, based on claimant's contemporaneous medical records, a work injury in 2000 and could not state within a reasonable degree of medical probability that she suffered a work injury. He opined that if claimant did have a work injury which resulted in the initial fusion, the subsequent recurrent symptomatology and second low back surgery are causally related. In other words, if the first surgery was the result of a work injury, so was the second surgery. He did not believe the altercation in August 2006 was a major factor in claimant's need for a second surgery. The altercation may have increased her pain but did not appear to have structurally altered the spine. Dr. Stein also noted that the medical records concerning claimant's neck condition showed that she denied any injury.

Dr. Stein saw claimant again on September 18, 2007, for an opinion regarding maximum medical improvement (MMI). Dr. Stein determined that he needed a CT scan of the lumbar spine to determine whether the fusions were healed. The CT was performed, and Dr. Stein determined that bone grafts between the vertebral bodies were solid. The posterior lateral grafts did not seem solid, but that was not uncommon. He believed she had an adequate fusion. Therefore, he found her to be at MMI.

Dr. Pedro Murati, a board certified independent medical examiner, examined claimant on March 5, 2008, at the request of claimant's attorney. She gave him a history of two work accidents, and he reviewed her medical records. After examining her, he diagnosed her with failed back surgery syndrome, status post anterior cervical discectomy and fusion at C4-5 and C5-6, status post anterior L4-5 and L5-S1 discectomies and fusion and posterior L4-5 and L5-S1 fusions, and status post L3-4 instrumented fusion.

Dr. Murati testified that claimant described an incident in September 2000 in which she injured her low back. He could not be more specific than that. He opined that her

current diagnoses are all within reasonable probability a direct result of the work-related accident in September 2002 and each and every working day thereafter. Claimant, however, did not tell him about an incident in which she injured her low back while lifting a 25-pound baby. He agreed that Dr. Snodgrass' note mentions such an incident. He did not know if claimant's work injury was before or after the date of that incident. Dr. Murati also said he had been provided no medical records suggesting that claimant suffered a work-related injury in May 2004 involving her neck. Claimant did not tell Dr. Murati about the shoving incident with her daughter. However, he reviewed Dr. Stein's report and agreed that claimant's second surgery was the result of whatever caused her first surgery.

Doug Lindahl, a vocational rehabilitation consultant, met with claimant on April 14, 2008, at the request of claimant's attorney. Together they compiled a list of 23 tasks claimant had performed in the 15-year period before her injury in September 2000. Claimant did not tell Mr. Lindahl that she managed a club, even though she had testified in her evidentiary deposition, taken September 26, 2006, that she managed a club for eight years ending in 1998, but only said she had been a bartender at that club. Mr. Lindahl said that typically, club managers tell him they do all the job tasks of the bartender, plus the manager jobs. She did not tell him that when she worked as a bartender, she also prepared and served food. He agreed that cooking and serving food would be another job task.

At the request of respondent, Dan Zumalt, a vocational rehabilitation consultant, reviewed the rating report of Dr. Paul Stein, the transcript of the evidentiary deposition of claimant taken December 29, 2006, and the opinion regarding work performance and task loss of Doug Lindahl. He did not meet with claimant. In reviewing claimant's previous employment as described by claimant in her deposition and Mr. Lindahl's report, along with Dr. Stein's restrictions, Mr. Zumalt listed positions that claimant had previously held, gave a wage opinion, and identified positions that in his opinion would fall within Dr. Stein's restrictions and that would require little on-the-job training.

#### **PRINCIPLES OF LAW**

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.<sup>4</sup> Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>5</sup>

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.<sup>6</sup>

### ANALYSIS

In Docket No. 1,030,289, claimant alleges she injured her back at work in July or September 2000 and every working day thereafter. Claimant relates a specific incident where she was picking up a box from the floor and about to empty its contents onto a table when she pulled a muscle in her back. She claims that she immediately reported this injury to her supervisor, Tony Widick. She also claims that because of this injury, Mr. Widick changed her job duties from running auto to operating a machine that allowed her to sit while working. Claimant also related that she went to her personal physician, Dr. Snodgrass, the next day after this incident. In her September 29, 2006, deposition, claimant testified that this incident occurred in July 2000, but in her January 16, 2007, preliminary hearing testimony she changed the alleged date of this incident to September 2000. At the July 28, 2008, regular hearing, claimant also testified that the onset of her low back symptoms was in September 2000.

Mr. Widick does not recall an incident in September 2000 where claimant hurt her back at work. He testified that if claimant had reported a work-related accident or injury to him, he would have had her complete an accident report and conducted an investigation.

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<sup>4</sup> K.S.A. 2008 Supp. 44-501(a).

<sup>5</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

<sup>6</sup> *Id.* at 278.

Mr. Widick also testified that he was not asked to, and he did not change claimant's job because of any injury. He said claimant moved around to different areas while working on the third shift.

Dr. Snodgrass' office records show claimant was seen in May 2000 for pain in her lower extremities. On September 8, 2000, she came in with complaints of back pain that began when she was holding a 25-pound baby and twisted wrong. There is no mention of an accident or injury at work. Dr. Snodgrass' records also show that claimant called his office on September 26, 2000, and requested him to complete forms for short term disability. His records make no mention of workers compensation or an injury at work.

All of claimant's medical bills were paid for by her personal health insurance and not by workers compensation insurance. When she was off work, claimant received short term disability, not workers compensation disability compensation. She signed the application form for those short term disability benefits, which denied that her accident or illness was work related.

Mr. Leidheiser testified that when he met with claimant in September 2000, she indicated that she might have injured herself at work three or four weeks earlier. She said that she did not report her injury to her supervisor, nor had she completed an accident report. Because claimant could not be specific about either the date or the facts of the alleged accident and because she had prior episodes of medical problems, he told her to talk to her supervisor and think over whether she wanted to file for workers compensation or short-term disability. Claimant returned a few days later and advised Mr. Leidheiser that she wanted to file for short-term disability, which she did.

The contemporaneous records from September 2000 do not support claimant's contention of a work-related injury. Not only the short-term disability form, but the records of claimant's own physician, Dr. Snodgrass, likewise establish that claimant's back injury did not occur at work. Dr. Stein acknowledged that he could not document a work injury in 2000 based on claimant's contemporaneous medical records, and he could not state within a reasonable degree of medical probability that claimant suffered a work injury. Claimant reported to Dr. Gonzales in August 2006 that her back symptoms returned after her altercation with her son and daughter.

In Docket No. 1,030,290, claimant alleges she injured her neck in May 2004 and every day she worked thereafter. Again, there is no accident report. Although claimant's supervisor during that time period thinks he made one, no such report could be located. Claimant again applied for short-term disability benefits instead of workers compensation, and her medical treatment was paid for by her health insurance. Claimant describes injuring her neck in a specific incident at work in May 2004 while pulling boxes down from a rack. She does not describe a gradual onset of symptoms or repetitive aggravations. She sought treatment from her personal physician, who referred her to Dr. Dickerson. When she saw Dr. Dickerson in September 2004, claimant completed a questionnaire indicating

that her neck injury was not work related. Dr. Stein also noted that claimant's medical records concerning her neck condition showed she denied any accident or injury at work.

**CONCLUSION**

(1) In Docket No. 1,030,289, claimant has failed to prove she suffered injury or injuries to her low back by an accident or accidents that arose out of and in the course of her employment with respondent. Because of this finding, the remaining issues are moot.

(2) In Docket No. 1,030,290, claimant has failed to prove she suffered injury or injuries to her neck by an accident or accidents that arose out of and in the course of her employment with respondent. This finding renders the remaining issues moot.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge Jerry Shelor in Docket No. 1,030,289, dated December 17, 2008, is reversed; and the Award in Docket No. 1,030,290 dated December 22, 2008, is modified as above described; and benefits in both docketed claims are denied.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of April, 2009.

\_\_\_\_\_  
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant  
Terry J. Torline, Attorney for Respondent and its Insurance Carrier  
Jerry Shelor, Special Administrative Law Judge  
Nelsonna Potts Barnes, Administrative Law Judge